

NTSB Order No.
EM-69

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 2nd day of May 1978.

OWEN W. SILER, Commandant United States Coast Guard,

v.

BRUCE WARREN, Jr., Appellant.

Docket ME-65

OPINION AND ORDER

The appellant, Bruce Warren, has appealed from the decision of the Commandant affirming suspension of his license (No. 467147) and merchant mariner's document (No. Z-556-50-7960) for misconduct aboard ship.¹ Appellant had served as a second assistant engineer aboard the SS AMERICAN LEADER, a United States merchant vessel, for a voyage to European ports starting from the port of New York. It was found that on July 21, 1975, near the end of the return voyage, appellant committed assault and battery on the third assistant engineer, one Tom Lados. The victim's injuries required that he be immediately transported, by the Canadian Coast Guard, to a hospital at Halifax, Nova Scotia.

Appellant's prior appeal to the Commandant (Appeal No. 2084) was from the initial decision issued by Administrative Law Judge Albert S. Frevola, after a full evidentiary hearing.² Throughout these proceedings appellant has been represented by counsel.

Both appellant and Lados testified at the hearing and were subject to cross-examination. It appears that an argument arose between them after the appellant had relieved Lados from the engineroom watch and then called him back, by means of a buzzer signal, to confront him with some spare burners for the vessel's boilers which had been left in an uncleaned condition. Lados was

¹Board review of the Commandant's decision is authorized by 49 U.S.C. 1903(a)(9)(B).

²Copies of the decisions of the Commandant and the law judge are attached.

still carrying his tools, including a pair of channel lock pliers in his left hand.³

In Lados' version, appellant struck him in the face without warning shortly after the argument began. Lados fell on his face and appellant stood on his back, then rolled him over and kicked him in the chest (Tr. 46). When Lados got up and staggered toward the exit, appellant grabbed him by the hair and slapped him several times before releasing him. The ship's purser, a trained physician's assistant, testified that because Lados appeared to be in a state of shock as a result of this beating, he recommended his immediate removal from the vessel, although the record does not indicate that his hospital stay was prolonged.

Appellant testified that Lados' fall had resulted from a slip rather than the blow; that he stepped on Lados' back to keep him from getting up, presumably to avoid retaliation; and that he grabbed Lados after he had gotten up only "because he was at that point about to walk into the steam lines...." (Tr. 118-119). Although admitting that he struck Lados "[a]s hard as [he] could...", in the first instance, appellant nevertheless raised a claim of self-defense, indicating that he delivered the blow because Lados was menacing him with the pliers (Tr. 117).

The two participants thus gave conflicting testimony, which they adhered to under cross-examination. Since there were no other eyewitnesses, the law judge was confronted with issues of credibility which he determined by generally accepting Lados' testimony and rejecting appellant's claim of self-defense. The law judge found that the "...offense represent[ed] an especially aggravated assault and battery..." mitigated by the fact that appellant "...was originally motivated by his concern for the safe operation of the boilers..." (I.D. 16). He thereupon entered the order suspending appellant's license and document for 8 months, and for an additional 4 months on 12-months probation.⁴

In his brief on appeal, appellant contends that there was sufficient evidence for a credibility finding in his favor and that he acted in self-defense. He further contends that the injuries to

³According to the record (Exh. A), they were ordinary pliers approximately 9 1/2 inches in length.

⁴Probation was conditioned by a provision that the additional 4-month suspension would become effective automatically if a further charge under 46 U.S.C. 239 should be proved against appellant during a 12-month period.

Lados were grossly exaggerated in his testimony and the documentary evidence. Counsel for the Commandant has not submitted a reply brief.

Upon consideration of the appellant's brief and the entire record, the Board has concluded that the aggravated nature of his offense and the injuries resulting therefrom were established by reliable, probative, and substantial evidence. We further conclude that there was insufficient evidence that he acted in self-defense. The findings of the law judge are adopted as our own. Moreover, we agree that the sanction is warranted under 46 U.S.C. 239(g) and the Coast Guard regulations issued thereunder.⁵

Appellant had the affirmative burden of establishing his claim of self-defense.⁶ He was, therefore, required to show that any menacing motions made by Lados with the pliers were such that there was a reasonable basis for the "...belief on his part that he [was] in imminent danger of bodily harm..."⁷ When Lados returned to the engineroom, he could have had no suspicion from the buzzer signal that there would be an argument. No evidence of any previous trouble between them was adduced. The argument was started by appellant almost immediately and soon developed into a cursing match.⁸ Although Lados held his own in that exchange, it was appellant who struck the first and only blow, which felled Lados. There is no testimony that Lados swung at appellant with the pliers, but only that he raised them over his head. This gesture alone could not be considered menacing under the

⁵The law judge referred to the scale of average orders where the recommended sanction for assault and battery(first offense) is a 6-month suspension. See 46 CFR 5.20-165, group F. No differentiation is made according to the severity of injuries but the law judge determined that the injuries in this case called for a greater than average sanction (I.D. 16).

⁶"...The plea of self-defense in a civil action...for an assault is an affirmative defense and the burden of proof of such defense rests upon the person asserting it..." Hartley v. Oidtman, 410 S. W. 2d 537 (1966). See also other cases cited in 6A C.J.S. Assault and Battery §40 (b).

⁷Smith v. Lauritzen, 356 F. 2d 171 (3rd Cir. 1966). See also 6A C.J.S. Assault and Battery §20.

⁸There is no evidence that any "fighting words" were used by Lados which may have constituted provocation on his part. See 6A C.J.S. Assault and Battery §18.

circumstances since Lados was defending himself at that point from appellant's blow. From our review of the record, therefore, it clearly appears that appellant was the aggressor throughout and was not acting in self-defense. We are not considering either the Commandant's point here, or that of the law judge, that Lados was right-handed and holding the pliers in his left hand (I.D. 13, C.D.5). While this would tend to further show that Lados did not intend to strike with the pliers in his left hand, we are here considering appellant's subjective interpretation of the threat to his safety and he was not shown to have known that Lados was right-handed. In any event, we perceive no such threat from Lados' action. Furthermore, even if Lados' gesture was menacing, we would hold that appellant used excessive force in view of any possible threat to his safety which would render him no less culpable for the assault and battery.⁹

Appellant argues that the law judge had no grounds for deciding credibility either way. On the contrary, the choice was predicated on a full evaluation of both witnesses' testimony. The law judge found that Lados gave straightforward answers to all questions and noted his consistency and candor, whereas the appellant had given prior inconsistent statements which influenced the decision to reject his claim of self-defense (I.D. 12-14).¹⁰ We have no reason to disturb these findings.

The ship's purser, who examined Lados immediately after the incident, described his injuries as follows: "He was bleeding profusely from his nose, there was a very large red spot in the frontal part of his head. There was slight bleeding from a cut in the scalp...I [also] ascertained that Mr. Lados was in shock..." (Tr. 165-166). In addition, the medical records in evidence indicate that Lados sustained numerous lacerations and contusions about his head and face, a bruised right hand and a swollen left eye (Exh. 3). In our view the injuries do not appear to be grossly exaggerated and support the sanction.

If the injuries had been any more serious, appellant's use of

⁹In this respect we adopt the Commandant's finding (C.D. 6-7). See Restatement, Second, Torts §70(1), which provides that "The actor is not privileged to use any means of self-defense which is intended or likely to cause a bodily harm or confinement in excess of that which the actor correctly believes to be necessary for his protection." See also Commandant v. Maull, 1 N.T.S.B. 2332, 2334-2335 (1972).

¹⁰During the shipboard investigation of the incident appellant had denied all knowledge of Lados' injuries (Exh. C).

fists could have been perceived as an assault with a dangerous weapon,¹¹ which is a revocable offense.¹² The lesser sanction imposed here is, therefore, commensurate with the seriousness of the injuries inflicted. As in Commandant v. Maull,¹³ we find a small degree of provocation which in no way justified the ensuing violence.

ACCORDINGLY, IT IS ORDERED THAT:

1. The instant appeal be and it hereby is denied; and

2. The law judge's order imposing an 8-month suspension together with a further probationary suspension, as affirmed by the Commandant, be and it hereby is affirmed.

KING, Chairman, McADAMS, HOGUE, and DRIVER, Members of the Board, concurred in the above opinion and order.

¹¹See, Gonns v. United States, 231 F. 2d 907 (10th Cir. 1956); State v. Gardiner, 522 S.W. 2d 323 (Mo. 1975); Pulliam v. State, 298 So. 2d 711 (Miss. 1974); and State v. Carpenter, 205 S.E. 2d 141 (S.C. 1974).

¹²The Coast Guard regulations provide that assault with a dangerous weapon resulting in injury is a revocable offense. 46 CFR §5.20-165 (Group F of Scale of Average Orders).

¹³Supra, ftn. 9.